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SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1910.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Petitioner,

v.

BUD R. LATTA,
Respondent.

No. 231.

BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CARL C. WRIGHT,
BENJAMIN T. WHITE,
Counsel for Petitioner

REED PRINTING COMPANY

SUPREME COURT OF THE UNITED STATES

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STATEMENT.

For the sake of clearness, the parties hereafter are designated as in the trial court—plaintiff and defendant. Briefly stated, the facts are as follows:

On May 9, 1907, plaintiff shipped from Tekamah, Nebraska, to Waterloo, Iowa, one mare and one colt which were destroyed by fire while in the possession of defendant, and before the completion of the transportation. For the purpose of the shipment, and determining the rate to be charged in accordance with the

rules and tariffs (record p. 46, Exhibit 3) the plaintiff declared the value of the animals to be $200. The statement of value was entered on the contract of shipment, or bill of lading (pp. 33 to 40, Defts. Ex. 1), and the shipping order (pp. 41 to 44, Defts. Ex. 2), both of which were signed by the plaintiff.

The petition was in usual form alleging shipment of the animals in question from Tekamah, Nebraska, to Waterloo, Iowa; that the value of the animals was $3,000. The answer admitted their shipment and destruction while in possession of the defendant; denied the negligence, and as a separate defense set forth that the carriage was interstate in character, and was shipped under the contract above referred to, in which the value was declared at $100 for each animal. As a further and separate defense it was set forth that the tariffs of the defendant were regularly published and filed as required by the act of congress regulating interstate commerce, and that the shipper, for the purpose of securing the rate named in said tariff, had declared the value of the animals to be $100 each; that by reason of the premises, the plaintiff was estopped to assert that they were of greater value after their destruction; that in understating the value of said animals plaintiff violated the law, and such violation should also prevent a recovery for a greater value than that declared.

The reply of plaintiff admitted the interstate character of the transaction and the filing of the tariffs of the defendant company, but alleged that the shipment was made in Nebraska, and was therefore controlled by the laws of the state of Nebraska, which prohibited the limitation of the liability of the defendant carrier.

At the trial plaintiff's counsel admitted (record p. 45) both the filing and publishing of the tariffs and

classifications of the defendant as required by law; copy of so much of the same as is pertinent to the case is set forth in the petition for the writ (p. 2 and 3) which this brief accompanies.

The trial court in this case directed the jury to return a verdict for the full value of the animals in question with seven per cent interest thereon from the date of their destruction. Doubtless the trial court did this in the belief that it was in accordance with the decision of the Circuit Court of Appeals for the Eighth Circuit, when the case was previously before it (*Bud R. Latta, Plaintiff in Error, v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, Defendant in Error,* 172 Fed. Rep. 850, 97 C. C. A. p. 198).

STATEMENT OF LEGAL PROPOSITIONS.

The questions arising on the face of the petition for the writ may properly be stated as follows:

(1) Is a declaration of value of property to be transported as an interstate shipment, for the purpose of securing a rate, valid and binding upon the shipper?

(2) Are the rights of the shipper and carrier in the case of rates and the method of their determination in case of interstate shipment, to be determined by the laws of the United States or must they be determined according to the laws of the state where the shipment originated?

(3) In case the carrier has filed and published tariffs, as required by the interstate commerce law, providing that the rate shall be based upon the value of animals shipped, and a shipper for the purpose of taking advantage of a rate upon a lower valuation, makes

a declaration of such valuation, can such shipper thereafter claim damages to the animals in excess of the amount so declared by him when they are lost or destroyed while in charge of the carrier?

The legal tariffs of the petitioner made provision for the classification of animals according to value, and the rates which the petitioner was authorized, and was compelled, to charge, were dependent upon the value of the animals as declared by the shipper. There was no collusion between the shipper and the carrier in this case whereby the animals were received under a false declaration of value knowingly by the carrier. The shipper stands alone in his concededly fraudulent conduct. There is every reason why the carrier should be protected. Why the guilty shipper should be protected is inexplicable. He was not compelled, oppressed nor overreached, but the carrier was misled and defrauded. It is peculiar—perhaps the irony of fate—that the shipper should profit by his misdeeds, and that the carrier should suffer two fold—once in the loss of its proper rate of charge, and again in being compelled to pay for loss of property at figures far in excess of the value of the risk it supposed it was assuming.

THE ESTABLISHMENT OF RATES ACCORDING TO VALUE FOR INTERSTATE COMMERCE IS PERMITTED UNDER THE INTERSTATE COMMERCE LAW: UNDERSTATING VALUES KNOWINGLY TO OBTAIN A RATE WHICH THE TRUE VALUE WILL NOT WARRANT, IS TO USE THE DECLARATION OF VALUE AS A DEVICE IN VIOLATION OF LAW, AND THEREFORE SHOULD PREVENT THE SHIPPER FROM RECOVERING FOR LOSS OF PROPERTY BY THE CARRIER, A SUM IN EXCESS OF THE AMOUNT DECLARED.

It has been held legal by the Interstate Commerce Commission, and recognized by the courts to be valid also, for carriers to establish schedules of charges applicable to a specific commodity and graduated reasonably according to value. When such rates are published, shippers are entitled to the rate corresponding to the actual value of the property offered by them for transportation. Shippers are not entitled under such rates to understate the actual value of shipments, for the purpose of obtaining the rate applicable upon articles of less value. The valuation stated to the carrier should correspond with the actual value as shown by the invoice or other credible evidence. Shippers misstating the value of property for the purpose of obtaining the rate applicable to property of less value, are considered guilty of misbilling and are subject to prosecution under Section 10 of the act to regulate commerce; and where the carrier acts in collusion with the shippers to secure such unlawful end, it likewise is liable to prosecution under appropriate sections of the federal law.

Conference Ruling Int. St. Com. Com. Traffic World. Vol. 6, No. 25, p. 919, Dec. 17, 1910.

In Matter of Released Rates (13 Int. St. C. C. Rep. p. 550) the fourth paragraph of the syllabus expresses

the idea of the Commission as to the lawfulness of rates fixed by valuation as follows:

> "A carrier may lawfully establish a scale of charges applicable to a specific commodity and graduated reasonably according to value. These rates must be applied in good faith, regard being had to the actual value of the property offered for shipment."

(A) *The shipper's false representation misleads the carrier to its injury and the former is estopped to claim more than the declared value.*

When a shipper declares the value of an animal for the purpose of securing a stated rate of charge, and it is received by the carrier in virtue of such declaration, without collusion or actual knowledge on the part of the latter that the value is not as declared, the shipper should not be allowed to afterwards claim that the animals were of greater value when lost or destroyed in possession of the carrier, upon the doctrine that the shipper is by such representation,—by his fraudulent conduct,—estopped from claiming a greater value.

Hart v. Penn. Ry. Co. 112 U. S. 331,
Jennings v. Smith, 106 Fed. 139,
Macfarlane v. Adams Ex. Co. 137 Fed. 982.
Taylor v. Weir, 162 Fed. 585.
Ullman v. C. & N. W. Ry. Co. 112 Wis. 150.

(B) *In understating the value and thus violating the law the shipper will not be permitted to recover a sum in excess of the declared value.*

This is on the ground that the law will not assist a plaintiff to obtain the fruits of an illegal act nor to secure an advantage over others who have complied with the law and paid the proper charges.

Section 10 of the Interstate Commerce act as amended by the act of March 2, 1889, (25 Stat. L. 855) and Section 1 of the Elkins act, approved Feb. 19, 1903, (32 Stat. L. 847) as amended by the act of June 29, 1906, (34 Stat. L. 584) make it unlawful to obtain transportation at less than the regular rate or to accept a concession whereby property is transported at less than that named in the tariffs. The statutes are slightly different in detail, but are aimed at one and the same object. Penalties are announced against both the carrier and the shipper for violation of the acts. These statutes are strong in covering every possible method by which forbidden discriminations are practiced, or rebates afforded, or preference or advantage given.

> "Courts will not aid a person whose cause of action, either upon his own showing or otherwise, appears to arise *ex turpi causa*, or from the transgression of positive law. They do not adopt this policy for the purpose of protecting a defendant, but from determination not to assist such a plaintiff."

Den. ex. Dem., Wooden v. Shotwell, 24 N. J. L. 789.

Melody v. Great Nor. Ry. Co. 127 N. W. Rep. 543. (S. D.)

Cont'l. Wall Paper Co. v. Voight & Sons Co. 212 U. S. 227, 262.

UPON CONGRESS IS BESTOWED THE POWER TO LEGISLATE UPON INTERSTATE COMMERCE AND IT HAS DONE SO, COMPREHENSIVELY AS TO RATES, SHIPPING CONTRACTS AND LIABILITY FOR LOSS. IT THEREFORE SUPERSEDES ALL STATE LAWS ON THOSE PHASES OF THE SUBJECT.

It is conceded by the opinion of the Circuit Court of Appeals rendered in this case (172 Fed. 850) that the act of congress regulating common carriers legislates upon the fixing of the rates, the issuance of bills of lading or receipts for interstate shipments, also that in so far as it does this, the act supersedes the provision of any state constitution or state law that should otherwise be considered as controlling. That is to say, upon the congress is bestowed the power to regulate commerce among the states. When that body legislates upon interstate commerce, the laws passed by it are to the exclusion of the written or unwritten laws of the several states upon a like phase of the subject.

Tullock v. Mulvane, 184 U. S. 497.

The pertinent matter of congressional action on this subject is found mainly in Sections 6 and 20 of the present Interstate Commerce law, and was therein contained at the time the respondent's alleged cause of action arose.

The first paragraph of Section 6 provides that the schedule of rates shall contain, among other things, in addition to all charges, any rules or regulations which in anywise affect or determine the rates and charges. By the 8th paragraph of Section 6 it is made unlawful to accept of any "greater or less or different compensation for such transportation of * * * property, or

for any service in connection therewith," than the rates and charges specified in the tariff on file and in force.

By the seventh paragraph of section 6, it is likewise made unlawful for a carrier, by any device, to "extend to any shipper any privileges or facilities * * * except such as are specified in the tariffs."

It is also required, by section 6, paragraph one, that the carrier shall establish certain rates, and file and publish not only printed schedules of those rates, but shall also publish a statement of "all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, the fares and charges, or the value of the service rendered to the passenger, shipper, or consignee." In accordance with this law, it is conceded that the petitioner Railway Company had filed and published its schedules of tariffs and regulations, a part of which, referring to this class of shipments, appears on page 46 of the record.

The shipper is conclusively presumed to know, not only the rate applicable to different valuations, but the terms and conditions under which a shipment is received by the Railroad Company, when those things are reflected in the filed and published tariffs, rules and regulations. *Texas & Pacific R. Ry. Co. v. Mugg*, 202 U. S. 242; *Texas & Pacific R. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Armour Packing Co. v U. S.*, 209 U. S. 56. The shipper in this case, therefore, is conclusively presumed to have known that the rate which he sought, and which was applied to this shipment, was a rate based upon a declared value, not to exceed $100 per animal; and that if he had declared the value to be more, the rate would have been higher.

By paragraphs eleven and twelve (embracing what is known as the Carmack amendment), of Section twenty, it is required: (1) That a common carrier shall issue a receipt or a bill of lading for an interstate shipment; (2) That such carrier shall be liable to the lawful holder of such instrument for loss or injury to property, caused by it or any connecting carrier; (3) That no contract, receipt, rule or regulation, shall exempt such carrier from the liability thus imposed; (4) That when the carrier issuing the bill of lading shall have satisfied the shipper's claim for injury or loss done by a connecting line it shall have a right to recover over against such connecting carrier; (5) That no contract, receipt, rule or regulation shall exempt such carrier from liability, imposed by the act.

The amendment also carries a proviso, as follows: "Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action, which he has under existing law."

THE PROVISO TO THE CARMACK AMENDMENT HAS REFERENCE TO REMEDIES FOR THE RECOVERY OF DAMAGES AND NOT TO SUBSTANTIVE LAW DEFINING LEGAL RIGHTS, AND HENCE DOES NOT PRESERVE THE NEBRASKA LAW FORBIDDING LIMITATION OF LIABILITY; FOR, AS CONSTRUED BY THE SUPREME COURT OF NEBRASKA, SUCH LAW IS SIMPLY A RULE OF EVIDENCE AS TO DAMAGES.

While conceding that the Congress has legislated upon the subject of rates and bills of lading affecting interstate shipments, it is claimed that the proviso to the Carmack act (Par. 11, Sec. 20) saves existing remedies and rights of action, thereby continuing in full force and

effect Sec. 4, of Art. XI of the Constitution of Nebraska, providing that "the liability of railroad corporations as common carriers shall never be limited;" and that the "limitation of liability" clause in the shipping contract is repugnant to this provision as interpreted by the Supreme Court of the state of Nebraska.

To this there is more than one full and complete answer.

A. *The purpose of the proviso to the Carmack Act is to save existing remedies, or causes of action, and not to create new substantive law or rules of right.*

Among other things, the Carmack Act attempts to create a new right, that is, a right in the shipper to recover from the initial carrier, notwithstanding that he delivered the shipment in good order, to a connecting carrier. The general rule is that where a statute creates a new right or prescribes a remedy, such remedy is exclusive unless the statute indicates otherwise. *Farmers' Etc. Natl. Bank v. Dearing*, 91 U. S. 29, 35. The proviso in question was added to make it clear that this statute was not intended to deprive the shipper of a right of action (a remedy) against the defaulting carrier. The statute does not read "of any remedy or *right* which he has under existing law," but uses the term "right of action," which is synonymous with remedy. It means not a substantive right, but the right to maintain an action, as has been held in numerous cases. Where the words "right of action" are used, as in this statute, they apply to the method of enforcing the claim. Such is the definition given in the Rapalje and Lawrence Law Dictionary 1132, Anderson's Law Dictionary 27, and is supported by the cases of *Hibbard v. Clark*, 56 N. H. 155, 158; *Boody v. Watson*, 64 N. H. 162; *Lumm v. Buckeye*, 45 Miss. 564, 566.

The Carmack Act is concerned alone with rights and duties embraced by the Act, and the obvious purpose of the proviso was to make plain that any specific remedy given by the Act should be cumulative for the wrongs described.

B. *The stating of the value, by the shipper of an interstate shipment, is required by law, for the purpose of finding the corresponding rate, and is not a matter of contract.*

The rights of the parties in respect to the rate charged were not fixed by the terms of the contract. The fundamental of a contract,—the meeting of minds, was lacking. The law,—the filing and publishing, as required by the Federal Commerce Act,—forced the shipper to state the value of the animals; forced the carrier to apply, and both the shipper and the carrier to abide by, the rate thus fixed by law. Neither party could legally agree to depart from the rules or regulations for fixing the rate; nor from the rate thus established. For departing therefrom or attempting to do so, carrier and shipper was each liable to prosecution and fine under pertinent sections of the Interstate Commerce Act. Knowingly under-stating the value is a fraud—a moral obliquity—which furnishes the basis of an estoppel. The defense of estoppel, in such cases, does not rest upon the contract between the parties, but upon a status or condition arising from the law and the fraud of the party against whom it is invoked. The situation is the same as though the clause limiting liability were entirely eliminated from the contract or had never been inserted therein. Without that clause, the facts justifying the application of the doctrine of estoppel *in pais* are just as strong and legally sufficient. It is clear, therefore, that the opinion

of the Circuit Court of Appeals fails to meet or comprehend the real feature of the case. Determining that the contract privately made between the parties was subversive of the Nebraska Law in respect to the liability clause, did not reach the heart of the case,—did not solve the real issue, which was created by the conduct of the shipper in defying the law, in respect to the fixing of rates controlling interstate shipments, and not by contract between the parties. The shipper declared the valuation in obedience to a law of the United States, and not as a contractual obligation, but he stated the value falsely in violation of such laws.

C. *The limitation of the Constitution of Nebraska does not create a remedy, but is itself a substantive rule of law for the measurement of damages, with which the proviso to the Carmack Act does not deal.*

As construed by the Supreme Court of Nebraska, the constitutional inhibition to limiting liability in cases of this kind, does not go to the remedy, but simply creates a substantive rule of law for the measurement of damages. When the carrier injures or loses an intrastate shipment, for which recovery may legally be had in that state, the measure of damages is the full value, and no agreement for a less amount will obviate a judgment for an amount equivalent to full value. The remedy, or right of action, was not created by,—did not owe its origin to,—the Nebraska constitutional provision, but existed as a legal remedy independent and prior to the adoption thereof. The proviso to the Carmack Act sought to save an existing remedy, or right of action, that was in nowise dependent for its beginning nor its abiding, upon the Constitution of Nebraska. That proviso does not pretend to say, nor,—by any rules of legal interpretation properly applied,—can it be said,

that it was intended to bar defenses recognized in the decisions of courts of the United States, of which defenses, estoppel *in pais*, and a violation of penal statutes are prominent and continuing ones.

(D) *To give the proviso to the Carmack Act the construction stated in the opinion, materially weakens, if it does not destroy, the Interstate Commerce Law in its main purpose, as applied to shipments transported at rates fixed upon value: this should be avoided if possible, and such construction be given the proviso as will uphold the main design of the Federal Commerce Law, if the words used, in their ordinary meaning, will justify that construction.*

The National Congress was moved to legislate concerning interstate commerce, moved by railway carriers, more largely, because of what was deemed unjust discrimination practiced toward favored shippers, and favored communities; and because of rebates and advantages furnished the same classes. Had it not been for the intolerant feeling for such ways of performing the public duties of a common carrier, it is doubtful if the Interstate Commerce Law would have been originally enacted and amended at various times, to reach its present structural perfection.

Having the prime purpose in mind, of doing away with evils, flowing from certain kinds of discrimination—from rebates, preferences, or prejudices, to favored shippers or localities, it is inconceivable that the National Congress, in legislating upon interstate commerce would purposely save the application of existing state laws, which would directly preserve those evils. It is just as inconceivable that the Congress would legislate so as to permit, indirectly, what it would not permit

directly; yet the interpretation insisted upon for the proviso to the Carmack Act, induces indirectly the continuance of the very evils that Congress for years has sought to obliterate. This proviso, as construed by the Circuit Court of Appeals, is as a knife planted in the heart of the entire act, which may sooner or later destroy its efficacy for the very purposes it was intended to subserve.

By construing the proviso to the Carmack Act so that it has the effect to apply the Nebraska law, in a manner to permit a deceitful shipper, while violating a Federal Law, to profit by his own dishonor, the rejuvenation and renewal of the old-time methods for giving rebates, advantages, preferences, and of affording discrimination, directly or through device or subterfuge is brought about: for, as in this case, a shipper can falsely declare and underestimate the value of his shipment, and thereby secure a correspondingly low rate,—a much lower rate than he is entitled to—and lower than the shipper, who having regard for his own self-respect, as well as the law, states the true value of his property.

The shipper thus fraudulently declaring the value, not only gains a rate to which he is not entitled, but in case of loss of property shipped, often obtains its full value, as in this case enormously above the value declared—thereby securing a discriminating rate, as well as a rebate, and under the law, as found in the opinion of the Circuit Court of Appeals, it is proper and legal that the carrier should submit to the iniquitous demand of such shipper, and pay the amount of money claimed as the actual value of the property in case of loss, since the law commands it.

Again, a shipper from Illinois to a point in Nebraska, finds that by the laws of the former state, he is

not privileged to declare one value,—a false and depreciated value—for rate-making purpose, and thereafter recover a greatly increased value, if it shall come about that the property is lost by the carrier; by the law of Illinois, no such premium is afforded for fraudulent conduct of that character. The value declared is the value that controls in a suit to recover damages, as well as for the fixing of rates in that state,—contrary to the rule that would prevail if the shipment had originated in Nebraska for transportation to a point in Illinois.

Is it fair or reasonable to believe that the Congress designed to loosen,—to disintegrate—the law in respect to shipments of this character, while remaining invulnerable and forbidding to wrong-doing in other respects? Did it mean to open the flood-gates and to permit rebating and discrimination to flow through, with like freedom as in years preceding the enactment of the Interstate Commerce Law? If not, why should not the proviso, giving the words thereof, their natural import and meaning, be construed rather to save the important purposes of the act as herein outlined so as to apply to shipments, the rate for moving which, is determined from the value, as in this case. Treating the proviso as saving existing remedies—the methods for enforcing rights—against any carrier actually in default prevents such impending disorder and destruction. It is certainly more consonant with reasonable interpretation that Congress intended that dishonesty of a shipper in a matter of this kind should be treated as the common law has ever treated it,—as the unwritten law of the courts of the United States has ever treated,—as a bar to a shipper from profiting by his own fraud.

WHETHER THE DEFENSE OF THIS CASE IS BASED EXCLUSIVELY UPON ESTOPPEL, ON ACCOUNT OF ORAL MISREPRESENTATION, OR UPON THE FACT SOLELY THAT THE PLAINTIFF BY HIS VIOLATION OF A PENAL STATUTE HAS PLACED HIMSELF IN A POSITION WHERE THE COURTS REFUSE TO AID A PARTY TO REALIZE THE FRUITS OF A CRIMINAL ACT,—IN EITHER CASE IT IS COMPLETE.

The Circuit Court of Appeals, in its opinion, seemed only to consider the enforcement of the contract, which is quite beside the question. The law of Congress, the rules, regulations and tariffs of the Railway Company, and the wrong-doing of the respondent, were all independent of the contract.

This court has considered estoppel *in pais* as a defense,—as one outside of the construction of contract; it is one of general law. The courts of the United States have always applied the doctrine of estoppel, the facts warranting, to prevent fraud and imposition. Even if the constitutional provision of the state of Nebraska prevented the enforcement of a contract limiting liability, it would not, and ought not to be construed as permitting the shipper to profit by his false representations. It ought not to be construed so as to allow the shipper to *perpetrate* a fraud. In respect to the representation made in the contract as to value there was no illegality except in its falsity. No public policy is violated in requiring the shipper to declare the value of the article shipped for the purpose of determining the rate. Good faith and fair dealing require that he shall be bound by the representations which have advantaged him, as was said by this court in the case of *Hart v. Penn. R. R. Co.* 112 U. S. 331.

> "If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assume, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed.. 2 Kent's Comm. 603, and cases cited: *Relf v. Rapp,* 3 Watts & Sergeant, 21; *Dunlap v. International Steamboat Co.,* 98 Mass. 371; *Railroad Co. v. Fraloff,* 100 U. S. 24. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss."

Public policy is also viciously assailed when one, through his very act of violating a penal statute, seeks to procure an advantage through the administration of the law, which in good conscience he should not enjoy. The plaintiff is in court making his demand and conceding his illegal act, as measured by the laws of the United States. It is from this tainted act that he seeks to enjoy beneficial results which ought not to be permitted to him.

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In view of the conceded power vested in this court to exercise discretion in the granting of a writ of this kind, the importance of the questions involved, the fact that one of the cases cited in respondent's brief to sustain his contention (*Miller v. Chicago, Burlington, etc. R. Co.*, 85 Nebr., 458), is now pending in this court on error proceedings to the Supreme Court of the State of Nebraska, and practically embraces the same questions as are raised here, it would seem just that this court

should receive the case at bar and consider it on the merits in connection with that case.

In the following we desire simply to direct the attention of the court to the point, made in respondent's brief, that the petition for *certiorari* comes too late. It may be that this court would have permitted the writ to issue when the opinion of the Circuit Court of appeals was rendered reversing the first judgment; but it seems to admit at least of a doubt whether such an application would have been entertained or granted, since the order or judgment of reversal *contained a direction remanding the case for new trial.*

In the case of *Chicago & North Western Ry. Co. v. Osborn*, (146 U. S., 354). Chief Justice Fuller in denying the application bases such denial of the writ on authority of certain cases referred to, in all of which the relief prayed was denied *because the order or judgment sought to be reviewed was not final.* True, the applications in the cases considered in that opinion were not for writ of certiorari, but nothwithstanding that, the case is significant for it clearly implies that the practice in that respect should be the same as on application for writ of error or appeal.

See also *Taylor v. Louisville & Nashville R. R. Co.*, 172 U. S., 647.

Forsyth v. Hammond, 166 U. S., 506, 514. Although this case does not follow that general rule, it clearly affirms its application (see p. 514) to a case like the one at bar. That is, it clearly recognizes the *general rule* that a writ will not be issued *in cases where there being only a matter of private interest, there has been no final judgment in the Circuit Court of Appeals.*

Again, it was deemed wise to exhaust all proper efforts before the Circuit Court of Appeals so, that if it became necessary to come to this court it could not be urged by counsel, as it doubtless would have been, that the record did not present, fully to the Circuit Court of Appeals on the first hearing all the questions that are now raised. In the opinion of that court the feature of the case, considered as controlling, was the asserted contractual relation which it was claimed sinned against the constitutional provision of Nebraska forbidding limitation of liability by railroad companies as common carriers. In fact the entire force of the opinion seems to have been directed to the alleged iniquity of an agreement privately made.

On the first trial, the admission of exhibit 3 (record p. 46) was denied, and it was this exhibit which disclosed the rules and regulations and the method of arriving at charges for transportation of a shipment of the kind in question. This exhibit was on file with the Interstate Commerce Commission, and by that fact became a part of the rules and regulations and the tariff authorized by law. None other could have been applied, and it therefore created a condition or status which could not have been altered, added to, or taken from, by any agreement of the parties. Notwithstanding an agreement entered into by counsel at the trial as to the tariffs, schedules and rates in force being on file with the Interstate Commerce Commission (record p. 45), inasmuch as exhibit 3, was refused admission as evidence, neither the exhibit nor the purpose for which it was offered, was considered by the court upon the first hearing so far as its opinion discloses.

On the second trial, however, exhibit 3 was admitted, and was before the trial court and the circuit court of appeals, for the very purpose intended by the petitioner herein, that is, to show what rules, regulations and tariffs were legally in force, controlling the charge made for transporting the shipment. Therefore, on the second hearing before the Circuit Court of Appeals it had before it an item of evidence clearly establishing, and illustrating the status, that existed between the carrier and the shipper, fixed and in force by the laws of the United States and not by an agreement of the parties breathing defiance of the Nebraska constitutional provision.

Respectfully submitted,

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